United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7182

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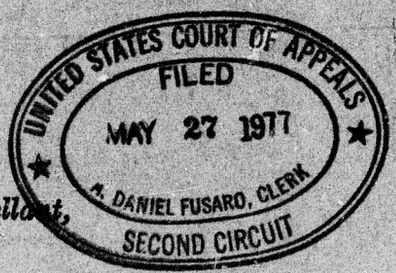
FOR THE SECOND CIRCUIT



ERIC E. SMITH,

Plaintiff-Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., *et al.*,

Defendants-Appellees.

Civil Action No. 75 Civ. 2507 (CMM)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTLICT OF NEW YORK

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the plaintiff, having suffered racial abuse while in the defendant company's employ, having been terminated on account of his race, and having been thereafter unjustly charged with incompetence and misconduct before the U.S. Coast Guard by the defendant, all on account of his race, has sufficiently alleged a continuing violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as as to render his administrative charge to the Equal Employment Opportunity Commission timely filed?

II. Whether the court below erred as a matter of law in refusing to consider the circumstances surrounding the plaintiff's failure to file his administrative charge of discrimination with the Equal Employment Commission within 300 days of his discharge from the defendant company's employ?

STATEMENT OF THE CASE

This is an appeal from an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.[1]. The action was brought before the Honorable Charles M. Metzner of the United States District Court for the Southern District of New York.

The plaintiff is a black merchant marine formerly employed by the defendant, American President Lines, Ltd. (hereafter, "APL"), and a member of the defendant union, Marine Engineers Beneficial Association (hereafter, "MEBA"). The plaintiff challenges the company's harassment, racial abuse and use of epithets against him while he was in its employ, his discharge on account of his race, and the company's subsequent conduct in unsuccessfully seeking the loss of his Coast Guard License subsequent to his dismissal. The plaintiff further challenges the union's failure to accord his full union membership, preferential referral to work based upon his length of service, failure to process his grievance concerning his discriminatory discharge from the company's employ, and subsequent retaliation against him for his having filed administrative charges of discrimination with the Equal Employment Opportunity

1. The Complaint alleged violations of the Civil Rights Act of 1866, 42 U.S.C. §1981, and of the duty of fair representation arising from 29 U.S.C. §151 et seq., A. 2 . The Court below dismissed the Section 1981 cause of action and a portion of the duty of fair representation cause of action. The parties have stipulated to the dismissal of the remaining cause of action under the duty of fair representation. Therefore the only subject of this appeal is the court's decision under Title VII.

Commission. Plaintiff seeks declaratory and injunctive relief, including back pay and proper union status, making him whole for the discrimination he has suffered.

PROCEEDINGS BELOW

Plaintiff's Complaint was filed on May 28, 1975. In their Answers, the defendants denied all of the material allegations of the Complaint and in addition denied the jurisdiction of the court based upon the asserted lack of timeliness of the plaintiff's charge to the Equal Employment Opportunity Commission.

After the defendant APL filed its motion to dismiss or in the alternative for Summary Judgment, the court below entered an opinion denying the motion with respect to its jurisdiction to consider claims under Title VII. Upon the defendant APL's motion to reconsider, the court granted the Motion, finding that the plaintiff had filed his EEOC charge more than 300 days after his termination from the company's employ. The court concluded that compliance with 42 U.S.C. §2000e-5(e) was jurisdictional vel non and dismissed the Title VII claims with respect to the company. Upon the filing of a stipulation between the parties that the court's decision with respect to APL should apply as well to the co-defendant MEBA without prejudice to the plaintiff's right to appeal the issue, the trial court entered its judgment of dismissal on March 18, 1977.

Plaintiff filed his Notice of Appeal on April 15, 1977.

STATMENT OF THE FACTS

On June 8, 1970, plaintiff's union, the defendant MEBA, referred him to work as a Second Assistant Engineer on a voyage of the defendant company's ship, the S.S. President Pierce. A. 3 While on the voyage, the plaintiff was harassed and abused on account of his race, A. 4 , and he was the frequent target of racial epithets by the ship's officers. A. 4 . During the course of the voyage, on October 5, 1970, the defendant APL discharged the plaintiff because of his race and color. A. 4 .

On the same day that the plaintiff received his notification of discharge from the company, APL filed two separate charges against him with the U.S. Coast Guard, which regulates the maritime industry. In the first, the company informed the Coast Guard that the plaintiff was fired for incompetence. A. 4 . Substantiation of these charges would have resulted in the plaintiff's having great difficulty resuming employment in the industry, but after lengthy investigation the Coast Guard determined on March 4, 1971, that the charges could not be substantiated. A.4,60-61 In the second charge filed by the company on the day of his discharge, it alleged that the plaintiff had been guilty of misconduct, used foul and disrespectful language, and engaged in disobedient conduct during the voyage. A. 4-5 . While substantiation of these charges would have resulted in plaintiff's loss of his Coast Guard license to work in the maritime industry

altogether, on September 2, 1971, the Coast Guard determined that the charges could not be substantiated. A. 61 .

On October 14, 1970, nine days after his discharge and Coast Guard charges, the plaintiff filed a charge of racial discrimination with the New York State Division of Human Rights against the company describing what had happened to him and further describing the union's failure to assist him in his grievance. A. 61 . After finding probable cause that discrimination existed in his case, the State Division held a total of seven days of hearings from January through April, 1971. A. 81 . In its decision, it found that his supervisor had "subjected the Complainant to abusive treatment and derogatory references to the Complainant's race and color," A. 82 , but it also concluded that APL had not violated State law in discharging the plaintiff. The State Division ordered the company to cease and desist from tolerating discriminatory and abusive conduct against its employees, and it further ordered the company to so notify all of the supervisory personnel in its employ. A. 84 . Plaintiff filed an appeal with the State Human Rights Appeal Board in October 1971, A. 85 , but withdrew his appeal after he had learned of the U.S. Equal Employment Opportunity Commission and had filed charges with that agency. A. 64 .

The plaintiff repeatedly sought the assistance of his union, the MEBA, in his efforts to challenge the company's treatment of him. While he was on the voyage and being subjected to racial abuse, he wrote to his union representative

complaining of his treatment. A. 78 . On the day of his discharge, he filed a grievance with his union representative, but the grievance was not processed. A. 5 . After he both won and lost his State Division hearing, he consulted the union's attorney, MEBA's counsel in this action, for legal assistance in maintaining his appeal to the State Board of Appeals. A. 63-64. Counsel refused his request for assistance. A. 63-64, 92-93.

On November 19, 1971, the plaintiff below filed two charges of employment discrimination with the U.S. Equal Employment Opportunity Commission. A. 87-89. In those charges, he complained of his treatment while on the voyage, his termination and his union's failure to process his grievance. His charges were amended on November 24, 1972, to include a challenge to the incompetence gounds of his termination and Coast Guard proceedings. A. 98 . After investigation, the EEOC issued its Determination, finding that both the company and the union had violated Title VII with respect to racial abuse on the voyage, termination, instigation of Coast Guard proceedings, and lack of union representation. A. 108-12 Both the company and the union thereafter participated in unsuccessful conciliation conferences with the EEOC. A. 113, 115. The EEOC's Notice of Right to Sue was issued on May 6, 1975, A. 14 , and this lawsuit was commenced twenty-two days later.

In the trial court, the company filed its motion to dismiss or in the alternative for Summary Judgment, correctly pointing

out that the plaintiff had filed his charge with the EEOC more than 300 days after the date of his termination from its employ et seq. A. 17/. Plaintiff responded to the motion with an Affidavit explaining the circumstances described above, and further pointing out that from 1970 to 1976, the date of his Affidavit, neither the company nor the union had posted the required EEOC posters notifying employees and union members of the availability of the agency for the filing of employment discrimination complaints. A. 62 . Plaintiff stated that had he had such information available to him prior to November 1971, when he first learned of the EEOC, he would have filed such charges promptly. A. 62 . Neither the company nor the union had disputed their failure to post the required notices, but the company asserted on brief below that, "It is highly unlikely that any black in America (sic) is unfamiliar with the Civil Rights Act and the Equal Employment Opportunity Commission..." A.129 .

Upon motion for reargument, the court below granted the company's motion, stating that, "Since plaintiff's charge was filed in excess of 300 days after his termination, plaintiff has not satisfied the time limits in 42 U.S.C. §2000e-5(e)." A. 151 . It is from this decision, refusing to consider plaintiff's termination as but one link in a continuing chain of discriminatory events and further treating Title VII's 300 day time limit as jurisdictional vel non rather than as a statute of limitations which could be tolled for equitable reasons, that the plaintiff now appeals.

ARGUMENT

I. DEFENDANTS' DISCRIMINATORY CONDUCT AGAINST THE PLAINTIFF CONTINUED WELL BEYOND THE DATE OF HIS TERMINATION FROM THE COMPANY'S EMPLOY, RENDERING HIS CHARGE TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TIMELY FILED.

In his Complaint, the plaintiff alleged the existence of a chain of events which constitute discriminatry conduct on the part of the defendants in violation of Title VII. For purposes of this appeal, his factual allegations must be taken as true. From June 8, 1970 through October 5, 1970, the defendant APL subjected him to recurrent harassment, abusive treatment and racial epithets while he was in its employ. On October 5, 1970, the company terminated him and filed unjustified and unsubstantiated charges against him with the U.S. Coast Guard, which charges were designed to discredit him with future employers and bar him from further employment in the maritime industry. A 4-5.

These events did not come to rest until September 2, 1971, when the Coast Guard dismissed the second of the charges which the company had initiated. A. 75 . Plaintiff filed his charges with the EEOC some two months later, on November 19, 1971. A. 87-89.

. The EEOC itself perceived what the court below did not, that these events were not isolated acts but rather formed a chain of conduct linked by a common motive - racial discrimination. The Commission included the Coast Guard charges in its investigation, A. 110,and made its Determination of probable

Title VII violation based in part upon them. A.110 .

With respect to the union, the defendant MEBA, it refused to investigate the grievance which the plaintiff filed immediately upon his termination and refused to further process it, on account of the plaintiff's race. A. 5 . This conduct did not even begin until after plaintiff's termination from the company's employ and it continued at least until December 10, 1971, when the union's retained counsel advised Mr. Smith that the only remedy which the union could provide was the processing of a grievance, A. 93 , a gesture which at that point was hollow to the point of vindictive. The EEOC included the union's inaction in the scope of its investigation, noting that the plaintiff "made a constructive effort to seek the assistance" of the union until December 10, 1971, and on the basis of this conduct the agency made its "reasonable cause" determination against the union. A. 110.

Since Title VII requires the filing of a charge of discrimination "within three hundred days after the alleged unlawful employment practice occurred",[2] the issue presented is: when did the unlawful employment practice occur? The legislative history of the Act and a series of decisions by this Court establish beyond cavil that the time for filing charges under 42 U.S.C. §2000e-5(e) does not commence until the last act of discrimination has "occurred".

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2. 42 U.S.C. §2000e-5(e) requires persons filing charges in states such as New York, having an agency with authority to grant the relief sought, to file with the EEOC within 300 days of the discriminatory act or within 30 days of the agency's termination of proceedings, whichever is earlier In Mr. Smith's case, the State agency's proceedings were terminated on February 10, 1972, when Mr. Smith withdrew his pending appeal to the State Human Rights Appeal Board, A. 94 .

In the 1972 Amendments to Title VII, Congress extended the period for filing charges from 210 days to 300 days, for persons in Mr. Smith's circumstances. Commenting upon the reasons for the extension of the filing period as well as the concept of continuing violations of the Act, the Congressional Joint Conference Report stated:

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extention of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected. It is intented by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen and who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints and that existant but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertance, delay or error." (Emphasis added) Section by Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, U.S. Senate Committee on Labor and Public Welfare, November 1972, p. 1849.

Thus, running of the time period is to commence with the last occurrence of discriminatory conduct, and not with the first. This principle has been repeatedly adopted in this Circuit for determining the scope of the statutory time period with respect to a series of events connected by the common thread of discrimin-

ation.

In Weise vs. Syracuse University, 522 F.2d 397 (2nd Cir. 1975), plaintiff Weise was denied employment as a lecturer with the defendant in 1969, was terminated from her employment as a teaching assistant in 1970, and was denied reconsideration for any teaching position in 1973. Plaintiff Mortenson received undesirable teaching assignments in 1968, was treated differently from her male counterpart in 1970, was told she would be terminated in June 1971, and was denied reconsideration of her termination in early 1973. This court held that both plaintiffs had complied with Title VII's filing requirements in a timely fashion since the last act of discrimination, their denial of reconsideration, had occurred after the Act's coverage of the employer within the 300 day filing period. The Court notes in passing that, "Alternatively, the complaint might be construed as alleging a continuing course of discriminatory conduct." Id. at 410, n. 20.

Similarly, in Egelston vs. State University College at Genesco, 535 F.2d 752 (2nd Cir. 1976), the Court viewed expansively the course of conduct complained of in the complaint. The decision holding her January 1973, EEOC charge timely filed focused upon the date of her discharge, as well as her impaired employment opportunities subsequent to her discharge. Relying

on the principle that the Act's time period commences only when the discriminatory conduct comes to rest rather than when it begins, the Court stated, "Appellant's discharge was consummated only when she left the university - or, possibly, when a replacement was hired." Id. at 755. This approach to calculating the commencement of the filing period was reiterated in Egelston's companion decision, Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976).

All three of this Circuits's Title VII decisions regarding the triggering of Title VII's adminintrative filing period are in complete accord with the Congressional purpose as articulated in its deliberation of the 1972 Amendments. It is the last "act" of discrimination in a chain of events, and not the first, which triggers the filing requirement.[3] In the instant case, the physical and verbal abuse which the plaintiff suffered on the ship's voyage constituted the first "act" of discrimination. His termination on October 6, 1970, was only an intermediate but related step. On that same day the company

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3. Title VII contains a separate time period governing the scope of monetary relief which a court may award, once a timely complaint has been litigated in the plaintiff's favor 42 U.S.C. §2000e5(g) places a two year limitation, prior to the date of filing charges with the EEOC, upon backpay recoveries. If Congress had intended that the only acts of discrimination cognizable under the statute were "fresh" to the point of having all occurred within the 300 day time period, the two-year limitation on backpay recovery would not have been necessary. In the instant case, if the plaintiff's EEOC charge of November 19, 1971 is considered timely filed, any backpay recovery he may be entitled to could reach back to his 1970 termination.

lodged charges with the Coast Guard which seriously impaired the plaintiff's ability to gain employment in the maritime industry until they were dismissed in 1971. During this period, plaintiff's position was in no material way different from that of Dr. Egelston who, having been discharged by her former employer, was unable to be employed anywhere else in the SUNY system. See, Egelston, supra at 755. With respect to the defendant MEBA, its conduct refusing the plaintiff in the processing of his grievance commenced on the day of his discharge and continued, as noted by the EEOC in its Determination, until December 10, 1971, less than one month after the plaintiff had filed his charge with the EEOC. A. 110 . The court below, in singling out the date of the plaintiff's discharge as the operative date of discrimination for purposes of triggering the filing period, was clearly in error.

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN TREATING THE STATUTORY FILING PERIOD AS JURISDICTIONAL VEL NON AND IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING THE PLAINTIFF'S FILING OF EEOC CHARGES.

Summary of Argument

To date, this Court has explicitly declined to determine whether Title VII's requirement for filing EEOC charges within 300 days of the discriminatory occurrence is a strictly applied jurisdictional prerequisite, or whether, as the Fifth and Tenth Circuits have concluded, it is more analogous to a statute of limitations, to which such equitable considerations as tolling and estoppel apply. The filing period, as indicated in the Act's legislative history and in recent cases construing the statute, is not jurisdictional vel non. Before a court may dismiss an action as untimely filed, it must evaluate any equitable circumstances advanced by the charging party/plaintiff to determine whether the reasons for late filing are sufficiently compelling to warrant application of the doctrines of tolling or estoppel.

Assuming arguendo that the plaintiff's period for filing charges with the EEOC would have ordinarily commenced on October 6, 1970, the date of his discharge, and would further have terminated 300 days thereafter, approximately three months prior to the date he actually filed his charges, his complaint

should not be automatically dismissed. The plaintiff took every step within his knowledge and power to protest the actions taken against him. He promptly filed charges with the State Division of Human Rights and actively litigated them for over a year. He successfully defended the vindictive Coast Guard charges lodged against him. He repeatedly sought, without success, the assistance of his union. The plaintiff's actions could hardly be characterized as slumbering on his rights. The undisputed record discloses that the only factor preventing the plaintiff from proceeding to the EEOC as promptly as his other steps were taken was the unlawful conduct of both the company and the union in failing to make the plaintiff aware of his rights through the required posting of EEOC posters. In the face of the plaintiff's otherwise persistent diligence, the defendants cannot be rewarded for their illegal behavior. Dismissal of this plaintiff's complaint by judicially discounting the defendants' legal obligations to make its employees and members aware of their Title VII rights would wholly undercut the purpose of the posting requirement, frustrate the purposes of the Act, and serve to encourage others covered by the legislation to do likewise in the future.

A. Title VII's Time Requirements for Filing Charges with the EEOC Are Not Jurisdictional Vel Non.

As discussed at some length in the preceding argument, Title VII provides alternative time limits for persons aggrieved

by discriminatory practices to file charges of employment discrimination with the Equal Employment Opportunity Commission. 42 U.S.C. §2000e-5(e). In the case of persons filing similar charges first with a State or local FEP agency, the time period is 300 days from the discriminatory occurrence or 30 days from being notified of the termination of agency proceedings, whichever is earlier. Ibid. The question presented by this appeal is whether compliance with these time requirements are jurisdictional vel non, absolutely and mechanically controlling the courts' jurisdiction, or whether they are more in the nature of statutes of limitations, subject to traditional equity principles. In the case of Egelston vs. State University College at Genesco, 535 F.2d 752, at n. 5 (2nd Cir. 1976), this Court pretermitted the issue, referring to it as "the still-open question..." Ibid.

The legislative history of the sections of Title VII concerning the time periods for filing charges with the EEOC is only marginally illuminating.[4] Senator Humphrey, who with Senator Dirksen negotiated the Senate compromises with H.R. 7152, which compromises were to become incorporated in Title VII, states of the filing period that:

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4. The Fifth Circuit has stated that "A uniform rationale" in interpreting the section "has not emerged" because the section was part of a Congressional compromise which was necessary to get the bill passed. See, Reeb vs. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 926, (5th Cir. 1975).

> "Section 706(d) establishes a 90-day period of limitation on the filing of a charge, with appropriate provisions to extend the period in the situation in which prior resort is had to a State agency. Moreover, section 706(d) is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to State or local authority. Such a person will not lose his right to seek Federal relief simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." Cong. Rec., U.S. Senate, June 4, 1964, pp. 12721-25.

Thus the only reference to the section, made by the bill's Senate floor manager on the eve of its adoption by the Senate, refers to the time period as a "period of limitations" containing flexibility so as not to cut off the rights of one who seeks to avail himself of State or local fora.

When Congress was considering the 1972 Amendments to Title VII which, inter alia, extended the filing periods with the EEOC, it specifically approved those court decisions which had interpreted the time limit "so as to give the aggrieved person the maximum benefit of the law." See, Legislative History of the Equal Employment Opportunity Act of 1972, supra at p. 1864. The continuing violations concept was approved, "untrained laymen" were to be given a "greater opportunity to prepare their charges and file their complaints", and undiscovered acts of discrimination "should not escape the effect of the law through a procedural oversight." Ibid. Thus, the legislative history, sparse thought it may be in describing the intent of Congress with respect to the EEOC filing periods,

hardly evidences a Congressional intent to have applied the time requirements in the rigid and mechanical manner of the court below. Rather than providing discriminators with a predetermined period of exposure from litigation, the intent of Congress was obviously to expand the circumstances in which victims of discrimination could maintain their challenge. This overriding concern for the rights of the Act's beneficiaries - untrained, often uneducated laymen who are usually proceeding without benefit of counsel through the administrative process - has led to a virtually uniform body of case law interpreting the statute, and particularly its technical procedural requirements, expansively, remedially, and equitably. Love v. Pullman Co., 404 U.S. 522 (1972); Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970), and cases cited therein; Voustis v. Union Carbide Corp., 452 F.2d 889 (2nd Cir. 1971) and cases cited therein. It is the tenor, as well as the substance, of these decisions that Congress has approved.

Two courts of appeals to date have squarely considered whether to statute's period for filing EEOC charges is subject to equitable considerations. The Fifth Circuit had initially characterized the filing of a charge with the EEOC as a "condition precedent to the bringing of a civil action" and that filing within the then-applicable time limit was a "fundamental." Sanchez v. Standard Brands, 431 F.2d 455, 460 (5th Cir. 1970). Subsequent decisions were not dispositive of the issue and

tacitly left the question open. Culpepper v. Reynolds Metals 421 F.2d 888, 891 (5th Cir. 1970); Belt v. Johnson Motor Lines, Inc., 458 F.2 443, 445, n. 3 (5th Cir. 1972). Finally, in Reeb v. Economic Opportunity Atlanta Inc., 516 F.2d 924 (5th Cir. 1975), the Court concluded that the statutory period for filing charges with the EEOC should be flexibly and equitably applied, in the nature of traditional statutes of limitations subject to equitable defenses. The Court noted the predominating confusion of language, particularly the use of the phrase "jurisdictional" which has frequently been applied to the filing requirement, and states that a mechanistic approach to applying the time constraints would be wholly out of step with Title VII's fundamental purposes. The controlling consideration should be whether a particular application of the time periods "would further the purposes of the statute considered as a whole." Id. at 927. Thus, the Court decided, where an explanation is offered by a plaintiff who would otherwise be beyond the statute's filing period, trial courts must not stop with counting on a calendar but rather they must consider the equities involved. See also, EEOC v. Nicholson File Co., 408 F. Supp. 229 (D.C. Conn. 1976).

The Fifth Circuit's decision in Reeb has been adopted with approval by the Tenth Circuit and applied to a case arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. In Dartt v. Shell Oil Co, 539 F.2d 156

(10th Cir. 1976), the appellant successfully argued that the ADEA's analogous 180-day period for filing notice of intent to sue with the Scretary of Labor was not a "jurisdictional prerequisite" that could never be extended, but that it is more in the nature of a statute of limitation subject to equitable modifications. Scrutinizing the appellant's asserted reasons for not complying with the letter of the statute, the Court concluded that she had stated a proper ground for tolling the running of the 180-day time period.

Reeb and, by analogy, Dartt, correctly interpret the nature of 42 U.S.C. §2000e-5(e). The failure to comply with the time period stated is not, without more, completely dispositive of the trials court's jurisidiction. It is rather an affirmative defense available to the defendant, and it is further subject to equitable applications such as tolling and estoppel.

B. The Defendants, Whose Conduct Was Chiefly Responsible For Plaintiff's "Late" Filing, Should Not Be Permitted A Statute of Limitations Defense.

Assuming arguendo that the operative date for measuring the plaintiff's victimization by the defendants was the date of his discharge on October 6, 1970, his first charge to the EEOC on November 19, 1971, was filed three months beyond the period ordinarily allowed by 42 U.S.C. §2000e-5(e). The defendants may therefore, as they in fact have done, plead the running of the limitations period as an affirmative defense and the plaintiff, as did not occur below, must have his rebuttal to that defense considered by the court.

The facts presented but not fully considered by the court below are not complex. On the day of his discharge, Plaintiff Smith began to seek to utilize his union grievance machinery to protest the action, and he continued this quest until December 10, 1971.[5] In less than one week he had filed comprehensive charges with the State Division of Human Rights and, after a lengthy investigation and hearing spanning almost a year, sought to appeal the portion of his charge upon which he

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5. Plaintiff Smith is not contending that his attempt to utilize his grievance machinery, standing alone, should toll Title VII's limitation period. See, Johnson v. Railway Express Agency, 421 U.S. 454 (1975), where it was held that the filing of a Title VII charge alone does not toll the running of other available civil rights statutes. Mr. Smith's conduct, however, further documents that he in no way slept on his rights.

did not prevail in the State Division.[6] In addition, during this period he was engaged in successfully defending himself on the two Coast Guard charges which the company lodged on the day of his discharge.

As he asserted in his uncontradicted Affidavit to the Court below,[7] A. 62 , only two factors prevented him from proceeding to the Equal Employment Opportunity Commission with the same haste with which he went to the New York State Division of Human Rights: his basic ignorance of the existence of the agency and the unlawful failure of the defendants to so inform him.

Title VII requires employers and labor unions alike to post in public places such basic information as what is prohibited by the Act and where one may go to assert his rights. 42 U.S.C. §2000e-10 (a) and (b). This information is to take the form of posters prescribed by the EEOC. 29 C.F.R. 1601.27. The Congressional intent behind such a requirement was so strong that Title VII's posting requirements, unlike those contained in analogous legislation,[8] include a monetary fine

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6. This appeal was withdrawn only after his union counsel had refused assistance and his EEOC charges were file and accepted for investigation by the Commission.

7. The company did urge the Court below to assume that every black person in America has by now become familiar with Title VII, A. 129 , an assumption, as discussed in the text above, never shared by Congress.

8. Compare 42 U.S.C. §2000e-10 (b), with 29 U.S.C. §627, the Age Discrimination in Employment Act.

for failure to comply. Moreover, in considering proposed amendments to H.R. 7152, the Senate rejected an amendment proposed by Senator Thurmond which would have provided that an employer's failure to comply with the notice posting requirement of Title VII would not constitute more than one offense until after the EEOC had given written notice of noncompliance to the employer. /110 Cong. Rec., Senate, June 17, 1964, pp. 14215-14216. The notice posting requirements were continued intact in the 1972 revisions of Title VII. The obviously strong Congressional concern was therefore that putative victims of discrimination should be given basic information about the law and how to lodge a complaint, and that this information was to be communicated by the employers and labor unions whose conduct is regulated by the Act. The only inference that may be drawn from Congress' continuation of the requirements after 1972 is that the public need for such information continues to exist.

The question presented by this appeal, therefore, is whether the totality of circumstances surrounding plaintiff's "late" filing of EEOC charges is sufficiently compelling to warrant denial of the defendants' defense.

In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 927 (5th Cir. 1975), the Fifth Circuit discussed in broad terms the relationship between the Act's time limits and the traditional, common law notions of statute of limitations defenses:

> "...the timing provisions will be subject to the same sort of equitable modifications that are applied to statutes of limitations, with the important additional requirement that these modifications will be applied in the interest of effectuating the broad remedial purposes of the statute. Thus, even in circumstances where a modification might be denied application at the common law, the modification might still be applied if the court felt that doing so would further the purposes of the statute considered as a whole."

The Fifth Circuit's paramount concern with the impact of a particular defense upon the fundamental purposes of the Act is fully consonant with the Supreme Court's admonition that relief under Title VII "should be denied only for reasons which, if applied generally, should not frustrate the central statutory purposes" of the Act. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, (1975). The Court in Moody further noted that if employers were not fully held to account for their unlawful conduct under Title VII, "they would have little incentive to shun practices of dubious legality." Id. at 417.

In Mr. Smith's case, the defendants' unlawful and undenied failure to comply with the Act's notice posting requirements has to date resulted in harm to Mr. Smith and benefit to the defendants. This result has been wholly frustrative of Title VII's dual objectives - encouraging victims of discrimination to enforce the Act as "private attorneys general" and encouraging compliance with the Act by employers and unions. Therefore, to the extent that the application of equitable principles to Mr. Smith's untimely filing is controlled by the purposes of the Act, the equities of denying

a time bar are in his favor.

Mr. Smith's claim also serves the traditional purposes of statutes of limitations as they are designed to cut off stale claims and bar persons who have unjustifiably slept on their rights. See, Johnson v. Railway Express Agency, 421 U.S. 454, 463-4 (1975). At no point could the defendants have reasonably believed that he had abandoned his claims or that they had grown stale. On the day of his discharge he protested. One week later he commenced what was later to become an adversarial, administrative hearing. And, of course, he filed charges, later amended, with the EEOC. The Commission, for its part, considered the charges timely filed and proceeded to investigate them with the active cooperation of the defendants. A.99, et. seq. Following the EEOC's Determination of unlawful conduct, both defendants engaged in substantial conciliation with the Commission. A.113,115. Following the failure of conciliation, this suit was promptly commenced. Mr. Smith, in short, did not abandon his protests and the claims did not grow stale.

Similar to the posture of the Defendants in Reeb, supra, the defendants here not only suffered no prejudice by the plaintiff's delay in filing charges, but their wrongful concealment of facts was itself the reason for the delay. Unlike the defendant's conduct in Reeb, however, these defendants' concealment was not only "wrongful" in the sense of unfair or inequitable, but it was flatly illegal. This Court must rescind the reward which the court below bestowed upon them for their unlawful behavior.

CONCLUSION

Wherefore, for the reasons stated above, the judgement of the trial court should be reversed and the cause remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Wells, attorney for Appellant, hereby certify that I have served copies of the foregoing Brief of Appellant and the accompanying Appendix upon counsel for the Appellees by causing two copies each of same to be placed in the U.S. Mail, postage prepaid, addressed to them, this 27th day of May, 1977.

William D. Wells